

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MICHAEL FERRARA ,

:

Petitioner/Appellant

:

v.

:

Docket No. 77-2142

UNITED STATES OF AMERICA

:

Respondent/Appellee

:

B
P/S

REPLY BRIEF OF PETITIONER/APPELLANT

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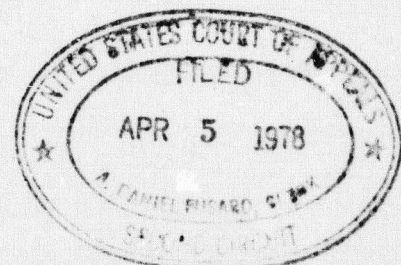


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STATEMENT OF ISSUES ON APPEAL

A.

FAILURE TO PLACE PETITIONER UNDER OATH IN
RULE 11, PROCEEDINGS

B.

CONDUCT OF COUNSEL, ALLEGATIONS OF
COERCION AND SENTENCE PREDICTIONS

C.

LACK OF FACTUAL BASIS FOR THE PLEA
OF GUILTY

A.

FAILURE TO PLACE PETITIONER UNDER OATH IN
RULE 11, PROCEEDINGS

In the Brief for Respondent-Appellee, the Government urges that even if "this circuit's practice is deficient, Ferrara cannot reasonably maintain that failure to place him under oath was an error of constitutional dimension entitling him to constitutional relief." (at 4-5).

Were, however, Petitioner seeking habeas corpus relief in the Fifth Circuit where he is now housed, in the Federal Correction Institute, Atlanta, Georgia, unequivocally he would be allowed to plead anew. United States v. Aldridge, 553 F.2d 922 (5 CA 1977); Bryan v. United States, 492 F.2d 775 (5 CA), cert. den, 419 US 1079, 95 S.Ct. 688, 42 LEd.2d 674 (1974); United States v. Coronado, 554 F.2d 166 (5 CA 1977), cert. den.

...Amended Rule 11 intends a litany. Not one, to be sure, for mere recitation; the trial judge must carefully and personally explore the defendants' understanding of each of its terms. But a litany in the sense thus we should not lightly, or perhaps not at all, undertake to add to it or diminish it by construction. Instead, it is simply to be followed as written and if so followed, it suffices. United States v. Adams, - F.2d - (5 CA; 77-5151; 1-27-78), Circuit Judge Gee, Specially concurring.

Reading into the Stassi case cited in Petitioner- Defendant's main brief (at p.8), Stassi v. United States, 439 F. Supp 277 (D. NJ 1976), aff'd

559 F.2d 1210 (3 CA 1977) , it appears the Third Circuit is also accord with the oath requirement of Rule 11. Again it is respectfully urged that particularly among the Federal judiciary predictability and uniformity is a paramount goal.

B.

CONDUCT OF COUNSEL, ALLEGATIONS OF
COERCION AND SENTENCE PREDICTIONS

A critical issue on this appeal is a dispute of fact. Defendant contends in return for pleading guilty the Government agreed, as was explained at the change of plea hearing, to dismiss certain counts and to recommend consecutive sentences. The Government, on the other hand, admits that in bargaining for a guilty plea it agreed to dismiss the counts, but did not consent to make a recommendation on lesser sentence than his co-defendant, [Brief for Respondent-Appellee, p. 10].

Petitioner-Defendant alleged in his pro se Motion "...that in fact Counsel of Record had represented unto movant that, movant would receive less time than his alleged co-defendant..." Appendix, p. 11a. He further stated the Government had threatened to seek "the longest prison term possible, if movant chose to go to separate trials...". Appendix, p. 14a. In support of the pro se application the Affidavit of Michael P. Ferrara appears where under oath the said allegations are verified. Appendix, p. 23a. The foregoing contravenes the position of the Government, Brief for Respondent-Appellee, p. 10, as to matters of specificity and conclusory allegations.

Admittedly no factual affidavit has been obtained for Ferrara's trial counsel. Since the trial judge stated being "well acquainted with the

excellent reputation of Mr. Ferrara's [prior] attorney, Michael Cairo, Esq.," Appendix, p. 100a, it is recognized to be potentially difficult to obtain such an instrument.

Moreover, the prosecution argues sub silentio that Ferrara and his counsel obviously agreed at sentencing with the Government's interpretation of the bargain, for if they had disagreed, there was still time to withdraw the guilty plea before the defendant was finally sentenced. Although it is not argued Ferrara waived his right to object by his failure to withdraw the guilty plea, see United States v. Millet, 559 F.2d 253 (5 CA 1977), 256-257, the prosecution does contend that this failure indicates Ferrara and counsel recognized that the Government's explanation of the plea bargain was correct.

These arguments may ultimately bear on the findings of the District Court, but they do not eliminate the need for a remand. "[I]n a responsible, factual way the judiciary [needs to know] what the real score is." Geisser v. United States, 5 Cir., 1975, 513 F.2d 862. United States v. Horovitz, - F.2d - (5 CA; 1-9-78; 76-3287).

Ordinarily contested issues of fact cannot be decided on affidavits alone. Campbell v. State, 487 F.2d - (8 CA 1973); Scott v. Estelle, - F.2d- (5 CA; 2-8-78; 77-2829).

C.

LACK OF FACTUAL BASIS FOR THE PLEA
OF GUILTY

A defendant is entitled to plead anew if the district court accepts his guilty plea without fully adhering to the procedures provided for in Rule 11. McCarthy v. United States, 394 U.S. 459, 463-464, 89 S.Ct. 1166, 1169, 22 LEd. 2d 418 (1969). See United States v. Adams, 566 F.2d 962 (5 CA 1978).

In McCarthy, the Supreme Court explained that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 394 U.S. at 466, 89 S.Ct., at 1171. See e.g. Sassoon v. United States, 561 F.2d 1154 (5 CA 1977), at 1157; Canady v. United States, 554 F.2d 203 (5 CA 1977), at 204; Monroe v. United States, 463 F.2d 1032 (5 CA 1972). Rule 11 mandates that the district court personally address the defendant before accepting the plea to determine that he understands "the nature of the charge to which the plea is offered." Routine questions on the subject of understanding are insufficient, and a single response, by the defendant that he "understands" the charge gives no assurance or basis for believing that he does. Sierra v. Government of Canal Zone, 546 F.2d 77, (5 CA 1977), at 79. The mere assurance of counsel is also

insufficient. See United States v. Vera, , 514 F.2d 102, (5 CA 1975), at 104. The district court should assume that the defendant is ignorant of the charges against him and should inform him of the basic acts required to establish guilt. Sassoon v. United States, supra, at 1158; United States v. Coronado, 554 F.2d 166 (5 CA 1977), at 172.

Applying the above standards to the case at bar results in a conclusion that the district court failed to properly inform the defendant, and determine that he understood the armed robbery charges against him. It is also unclear whether the requisite mental element for an offense of armed robbery has been developed on the record as required by Rule 11 (f) of F.R. Cr. P. See Sierra v. Government of Canal Zone, supra at 80.

Compliance with Rule 11 is mandatory, and the defendant need not show further prejudice. Sassoon v. United States, supra at 1160; Canady v. United States, supra at 205. The defendant must be allowed to plead anew. United States v. Lincecum-F.2d - (5 CA; 77-5644, 77-5642; 3-6-78).

In United States v. Adams, - F.2d - (5 CA; 1-27-78; 77-5151), the trial judge did three things to inform the defendant of the nature of the charge to which he pleaded and to determine that the defendant understood the nature of the charge. First, the trial judge determined from Adams that he had received the indictment and gone over it with his attorney. Second, the charge was read to Adams. cf. Appendix, pp 66a - 69a. Third, after Adams described the transfer of the cocaine in his own words, [cf. Appendix, p. 69a]

the trial judge asked him if he "intend[ed] to distribute or sell" the cocaine. Adams denied intent to distribute cocaine, a statement that might have aroused doubts as to Adams' understanding of his plea. Ferrara denied being armed and using force. Appendix, p. 69a 0a. The trial judge in Adams, just as the trial judge below, made no attempt to explain the charge.

The Fifth Circuit held that the trial judge did not properly inform Adams of the nature of the charge he faced and did not determine that he understood the charge. In dictum in United States v. Coronado, 554 F.2d 166 (5 CA 1977), at 174 n. 12, the question whether amended Rule 11's additional requirement that the trial court inform the defendant of the nature of the charge must be literally construed was reversed. Following McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418, (1969) and United States v. Aldrige, 554 F.2d 922 (5 CA 1977) (per curiam), the Fifth Circuit held that the trial court must personally inform the defendant of the nature of the charge. See Sassoon v. United States, 561 F.2d 1154 (5 CA 1977); Canady v. United States, 554 F.2d 203 (5 CA 1977); United States v. Coronado, 554 F.2d 166 (5 CA 1977); Sierra v. Government of Canal Zone, 546 F.2d 77, (5 CA 1977).

To inform a defendant of the nature of the charge must mean more to having the indictment read to the defendant. Reading the indictment informs the defendant of the technical charge. But the trial court should proceed

"on the assumption that the defendant is ignorant of the nature of the charges". United States v. Coronado, 554 F.2d 166, (5 CA 1977) at 172. In most cases, only the most sophisticated defendant would be informed of the nature of the charge by reading the indictment without more.

Some defendants are more sophisticated than others, see United States v. Saft, 2 Cir. 1977, 558 F.2d 1073, 1079. Some charges are more difficult to understand than others. United States v. Coronado, 554 F.2d at 172. But "no matter how simple the charges, a district court should make the minor investment of time and effort necessary to set forth their meaning and demonstrate on the record that the defendant understands". Id. And when there is a lesser included offense, as in this case with simple possession, "personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty" seems essential. McCarthy v. United States, 1969, 394 U.S. 459, 467 n. 20, 89 S.Ct. 1166, 1171, 22 L Ed. 2d 418, 426 n. 20. See 8 Moore's Federal Practice ¶11.02[1] at 11-25, citing Dorough v. United States, 5 Cir. 1967, 385 F.2d 887, 894 (Goldberg, J., dissenting). See also 1 Wright, Federal Practice and Procedure §173.

Here, the trial judge made no attempt to explain the charge or to assure himself that the defendant understood it. Cf. Canady v. United States, 554 F.2d 203 (5 CA 1977), at 205.

In the instant case, rather than personally inform the defendant of the nature of the charges against him as provided by law, the trial court allowed the Assistant United States Attorney to provide the required information as to the use of a firearm. The trial court's role in the Rule 11 (c)

aspect of the guilty plea proceeding was limited to asking the defendant whether he understood the nature of the charges against him and the consequences of his plea, and whether he understood all of the rights he would be giving up upon acceptance of the plea of guilty. This procedure does not comport with the requirements of Rule 11. See United States v. Hart, - F.2d - (5 CA; 1-27-78; 77-5818).

In United States v. Crook, 526 F.2d 708 (5 CA 1976), the Fifth Circuit read "the language of Rule 11 requiring the court to personally address the defendant to mean exactly what it says." Id. at 710 (emphasis supplied). In Crook, the statements and inquiries that Rule 11 required the court to make were made instead by the prosecutor in the judge's presence. The Fifth Circuit reversed the conviction, reasoning that the "language of Rule 11 Commands the Court to personally address the defendant. The Supreme Court has strictly construed this language in McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed. 2d 418(1969)." Id. at 709. United States v. Hart, supra.

The confusion stems from the force or intimidation element. Appendix, p. 69a.

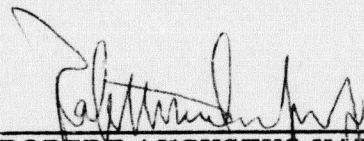
THE COURT:	Did you use any instruments or weapons?
THE DEFENDANTS:	No.
THE COURT:	No or just verbal..
THE DEFENDANT:	It was just a verbal agreement.

The trial court here did not personally ascertain the coercion used by the defendant. Moreover, as explained in Crook, "[a]llowing the prosecutor to make the required inquiries of the defendant results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11", United States v. Crook, supra, at 710. This rationale is equally applicable when the prosecutor, rather than the judge, makes the explanations required by the rule. [Appendix, p. 70a]. "The robe mantles the judge in the majestic impartiality of the law and was never intended to be merely decorative." United States v. Hart, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Roger C. Field, Esquire, ^{c/o} David G. Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by mail this 22 day of March, 1978.

Respectfully submitted,



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